88-1791

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Petitioners

v.

DISTRICT OF COLUMBIA,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed August 30, 1988

No. 88-7074

DISTRICT OF COLUMBIA NURSES' ASSOCIATION, THELMA BATTLE, *et al.*,

v.

DISTRICT OF COLUMBIA,

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 87-01675)

On Responses to Order to Show Cause

Douglas Taylor for appellant.

Frederick D. Cooke, Jr., Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Susan S. McDonald*, Assistant Corporation Counsel, for appellee.

Before MIKVA, BUCKLEY, and D.H. GINSBURG, *Circuit Judges.*

Opinion PER CURIAM.

Concurring statement filed by *Circuit Judge* MIKVA.

PER CURIAM: Appellant District of Columbia Nurses' Association ("D.C.N.A.") noted this purported appeal from an order entered by the district court granting the District of Columbia's motion for summary judgment and denying the motion for summary judgment filed by individual plaintiffs. Concern about our jurisdiction prompted the court to issue an order for the parties to show cause as to why the appeal should not be dismissed for lack of jurisdiction. The District of Columbia responded with a short memorandum urging dismissal. D.C.N.A. responded with a motion to allow appeal and redesignate appellants. We deny D.C.N.A.'s motion and dismiss the appeal.

D.C.N.A. and several nurses who are D.C.N.A. members commenced this action in the district court to challenge the failure of the District of Columbia to pay its nurses overtime at the rate of time-and-a-half as they contend is required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1) (1982). D.C.N.A. and the individual nurses are represented by the same counsel.

The District of Columbia moved for summary judgment, claiming, *inter alia*, that D.C.N.A. lacks standing under the FLSA. In response to this claim, the plaintiffs filed a motion to amend their complaint to remove D.C.N.A as a party and designate one of the individual nurses as lead plaintiff. The district court granted the motion, and the Clerk filed the amended complaint in which D.C.N.A. was no longer listed as a plaintiff.

Several weeks later, the district court granted the District of Columbia's motion for summary judgment. D.C.N.A. filed a notice of appeal captioned "The District of Columbia Nurses' Association, *et al.*, Plaintiffs," stating that "[n]otice is hereby given that [D.C.N.A.], Plaintiff named above, hereby appeals to [this court] from the final judgment entered in this action on the 28th day of January, 1988." This court entered an order

to show cause why the appeal should not be dismissed since the purported appellant was no longer a plaintiff at the time of the judgment and no remaining plaintiff had been identified as an appellant. *See Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988) (court of appeals only has jurisdiction over appeals of parties identified in notice of appeals); *United States v. LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984) (only party to district court action may note an appeal).

In response to our order to show cause, D.C.N.A. raises several arguments that it claims establish the court's jurisdiction over this appeal, none of which is persuasive. First, it asserts that D.C.N.A. "appeared to be considered a party by the court below" and that "it was not clear that D.C.N.A. was no longer a party" because its name continued to appear in the caption on papers prepared by the district court after the court granted the motion to amend. Appellant's Memorandum in Support of Motion to Allow Appeal and Redesignate All Plaintiffs as Appellants ("Appellant's Memorandum") at 2.

D.C.N.A. removed itself from the case on its own motion. In the mind of D.C.N.A.'s counsel, D.C.N.A was no longer a party until this court questioned its jurisdiction over this appeal. *See* Certificate of Counsel Pursuant to General Rule 11(a)(1) filed March 30, 1988 ("Originally, the [D.C.N.A.] was a party to this action, but was removed by order of the Court"). Furthermore, it is clear that the district court considered D.C.N.A. no longer to be a party because it describes plaintiffs as "registered nurses" with no mention of an organization. Memorandum filed January 28, 1988 at 1. Given these circumstances, D.C.N.A.'s assertion that it was still a party to the district court proceedings after that court granted the motion to amend rings false indeed.

D.C.N.A. also claims that even if it is no longer a party, it has standing to appeal. D.C.N.A. misreads

United States v. LTV Corp., 746 F.2d 51 (D.C. Cir. 1984), when it claims that in order to appeal, all that is necessary is that "[a]n appellant . . . be 'privy to the record' below and . . . be aggrieved by the order appealed from." Appellant's Memorandum at 4. This court clearly stated that "the general rule [is] that an appellant must be a party to the proceedings in order to file an appeal." *Id.* at 53. Although we recognized that there are certain exceptions to the general rule that an appellant must be a party, *id.* at 53 n.5, none is applicable here.

D.C.N.A.'s reliance on *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979), is equally misplaced. In *Adams*, the appellant filed objections to a motion for summary judgment in the district court but did not file a motion to intervene. "The [district] court properly viewed appellant's objections as a formal entry into the case, and decided the merits of the motion as if appellant had participated in every stage of the proceedings. . . . [A]ppellant's counsel . . . conceded that his client should be treated as an intervenor." *Id.* at 1318. In this case, on the other hand, D.C.N.A. *removed* itself from the case *after* participating in the earlier stages. Accordingly, it cannot successfully argue that it is still a party because it participated below.

D.C.N.A. also asserts that because of the congruity of interests among D.C.N.A. and the individual nurses ("Thelma Battle, *et al.*"), the appeal by D.C.N.A. should be considered an appeal by the individual nurses. D.C.N.A. argues that if the body of the notice of appeal had read "District of Columbia Nurses Association, *et al.*," rather than simply "District of Columbia Nurses' Association," the individual nurses would have been permitted as appellants. Based on this claim, the Association moves this court for an order designating the nurses as appellants.

In support of its motion, D.C.N.A. relies on two opinions of the Fifth Circuit: *Ayers v. Sears, Roebuck & Co.*, 789 F.2d 1173 (5th Cir. 1986), and *Parrish v. Board of Comm'rs of Alabama State Bar*, 505 F.2d 12 (5th Cir. 1974), *opinion withdrawn on other grounds*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), *appeal after remand*, 533 F.2d 942 (5th Cir. 1976). In those two cases, the Fifth Circuit followed "a less strict application of [Fed. R. App. P. 3(c)], permitting, in limited instances, appeals by parties not named in the notice of appeal." *Ayers*, 789 F.2d at 1177. Inexplicably, D.C.N.A. does not discuss *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988), cited in this court's order to show cause.

Torres was one of a number of plaintiffs who, after receiving notice of a proposed settlement agreement, intervened in an employment discrimination suit against Oakland Scavenger. The complaint in intervention was dismissed and the plaintiffs appealed, but Torres' name was inadvertently omitted from the notice of appeal. The Ninth Circuit reversed and remanded the case.

On remand, the district court applied Rule 3(c) strictly and held that Torres had failed to appeal the original judgment; therefore, the judgment was final as to him. The Ninth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict in the circuits, identifying *Ayers* as one of the cases following the contrary rule. *Id.* at 2407 & n.1. The Court rejected the more liberal application of Rule 3(c) used by the Fifth Circuit in *Ayers*, and held that parties taking an appeal must be named or otherwise identified in the notice of appeal. The court of appeals does not have jurisdiction over an appeal by a purported appellant not identified in the notice. *Id.* at 2409.

The Court explicitly rejected the argument that use of the term "*et al.*" sufficiently identifies a party as an ap-

pellant, stating that the term utterly fails "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Id.* While the Court left open the possibility of amendment of the notice within the time limits set by Rule 4, the motion to amend to include the individual nurses is untimely. *See* Fed. R. App. P. 4(a)(5).

Relying on *Chathas v. Smith*, 848 F.2d 93 (7th Cir. 1988), D.C.N.A. argues that this court has power to include the nurses in the appeal pursuant to the All Writs Act, 28 U.S.C. § 1651. In *Chathas*, the question presented to the court was whether failure to identify a particular *appellee* in a notice of appeal would be fatal to the appeal against that appellee. The court held that since omission of the name did not mislead the putative appellee, the omission was harmless error and amendment of the notice was unnecessary. The court also stated that in appropriate situations, the All Writs Act could provide the power to amend the notice to identify an appellee.

While Rule 3(c) requires that appellants be identified it does not require that appellees be identified; therefore, when an appellee is not identified, as in *Chathas*, the court has jurisdiction over the appeal, and the issuance of a writ adding a party below as an appellee would be "in aid of [that] . . . jurisdiction[]." 28 U.S.C. § 1651(a). When a purported *appellant* is not identified, however, the court has no jurisdiction of the appeal. *Torres*, 108 S. Ct. at 2409. An order of this court granting status as appellants to the individual nurses would have the effect of *creating* jurisdiction in this court when the court does not have jurisdiction, a power not granted by the All Writs Act. *M'Clung v. Silliman*, 19 U.S. 598 (1821); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984). Therefore, we do not have the power to "redesignate" the nurses as appellants.

This appeal was noted by a former plaintiff that had become a stranger to the litigation. No remaining plaintiff noted an appeal, and this court does not have the power to grant status as appellants to those remaining plaintiffs based on the use of the term "et al." in the notice of appeal or the relationship between the remaining plaintiffs and the former plaintiff that noted the appeal. Consequently, we deny the motion to allow appeal and redesignate appellants, and dismiss the appeal for lack of jurisdiction.

So ordered.

MIKVA, *Circuit Judge, concurring*: I write separately to underscore the particularly harsh result that follows from today's decision in this case. I agree the result is compelled by the Supreme Court's recent interpretation of Federal Rule of Appellate Procedure 3(c) in *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988); the case uniquely illustrates how tough the rule can be.

Plaintiffs' appeal on the merits of their case will not be heard simply because their notice of appeal failed to specify all their names—even though there has been no surprise, detrimental reliance, or undue prejudice to the appellee. I cannot believe this result is consistent with the intent of the Federal Rules to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. It would appear that we are back to the bad old days of the snares and tricks that would befall an inartful pleader at the common law. The advent of the Federal Rules of Civil Procedure, as the title implies, was supposed to civilize the process and look to fairness rather than technicalities.

Unless and until Congress or the Supreme Court decrees otherwise, we must deny these litigants their right to appeal. I reluctantly concur.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 87-1675

DISTRICT OF COLUMBIA NURSES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

JUDGMENT ORDER

In accordance with the Memorandum entered this 28th day of January, 1988, judgment is entered for the defendant.

GEORGE H. REVERCOMB
Judge

Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1675 GHR

THE DISTRICT OF COLUMBIA NURSES' ASSOCIATION, *et al.*,
Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that The District of Columbia Nurses' Association, Plaintiff named above, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 28th day of January, 1988.

Respectfully Submitted,

February 26, 1988

DOUGLAS TAYLOR
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

DISTRICT OF COLUMBIA NURSES' ASSOCIATION,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

CERTIFICATE AS TO PARTIES, RULING AND RELATED CASES

A. *Parties and Amici.* The District of Columiba was the defendant below and is appellee in this Court. The plaintiffs below were originally the District of Columbia Nurses' Association, Thelma Battle, M. Jane Blais, Doris B. Childress, Shirley Clagett, Beverly J. Freeman-Owen, Maudine B. McFadden, Yolanda D. Rowzie, Juanita K. Wagner and Mary Wilks. On July 14, and August 14, 1987 the district court granted the plaintiffs' motion to name additional claimants. The list of additional claimants are attached to this certificate as Attachment A.

On December 10, 1987, the district court granted the plaintiffs' motion (filed November 30, 1987) to amend their complaint by removing the District of Columbia Nurses' Association as a party plaintiff and naming Beverly Freeman-Owen as the "lead" plaintiff. The amended complaint named as plaintiffs the same plaintiffs named in the original complaint, except the District of Columbia Nurses Association. The District of Columbia believes, therefore, that the appellants in this court are the named individuals, but more the District of Columbia Nurses' Association.

B. *Rulings Under Review.* This appeal is from the unreported January 28, 1988 judgment order and memorandum opinion of the United States District Court for the District of Columbia (George H. Revercomb, J.) granting defendant District of Columbia's motion for summary judgment, denying the plaintiffs' motion for summary judgment, and dismissing the action.

C. *Related cases.* This case has not previously been before this Court or any other court, except the court below. Counsel is not aware of any other related pending cases in this Court or in any other court.

Respectfully Submitted,

FREDERICK D. COOKE, JR.
Corporation Counsel

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Appellate Division

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 88-7074

THELMA BATTLE, *et al.*

vs.

THE DISTRICT OF COLUMBIA

STATEMENT OF ISSUES TO BE RAISED ON APPEAL

Appellants Thelma Battle et. al., present the following issues on appeal.

1. Did the District Judge correctly find that Registered Nurses employed by the District of Columbia are exempt from the maximum hours provision of the Fair Labor Standards Act, 29 U.S.C. Section 207(b)(1) and regulations promulgated thereunder?

2. If so, was it proper to dismiss the entire cause of action in face of uncontradicted evidence that at least some of the Plaintiffs spend more than 20% of their work time engaged in non-professional tasks?

Respectfully Submitted,
Attorney for Appellants

DOUGLAS TAYLOR
THE LABOR BUREAU, INC.
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(202) 296-7420

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 88-7074

THELMA BATTLE, *et al.*

vs.

THE DISTRICT OF COLUMBIA

CERTIFICATE OF COUNSEL
PURSUANT TO GENERAL RULE 11(a)(1)

The following includes all Plaintiff/Appellants in the instant matter:

1. Dianne Ambuehl
2. Salvacion Aquino
3. Thelma Battle
4. Jeanette A. Blackman
5. Anna Blais
6. Jane Blais
7. Annette W. Byrd
8. Mary Jane Canete
9. Doris B. Childress
10. Shirley Claggett
11. Katherine P. Coleman
12. Carolyn A.B. Curtis
13. Patricia C. Evans
14. Helen M. Ferris
15. Mable A. Goss
16. Verna C. Hill
17. Roberta Holborough
18. Barbara J. Lorsung
19. Maudine B. McFadden
20. Emma Miles
21. Lillian W. Moore
22. Rose M. Murray
23. Tazzie L. Onwubere
24. Beverly Freeman-Owen
25. Dorinda M. Picolo
26. Patricia A. Powell
27. Gloria M. Rose
28. Yolanda D. Rowzie
29. Sandra K. Ruark
30. Christine S. Ruschmeyer
31. Jeanetta Shaw
32. Eldra Simmons
33. Julie A. Sonn
34. Barbara K. Spivey
35. Louise M. Vayda
36. Juanita K. Wagner
37. Mary Wilks
38. Rosa W. Williams
39. Pauline R. Yeargain

Originally, the District of Columbia Nurses' Association was a party in this action, but was removed by order of the Court. The sole Defendant is the District of Columbia.

Respectfully Submitted,
Counsel for Appellants

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(202) 296-7420

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

ENTRY OF APPEARANCE

CAPTION

THELMA BATTLE, *et al.*

v.

DISTRICT OF COLUMBIA

PARTY

The Clerk will enter my appearance as counsel for:

— Appellant(s)

— Petitioner(s) Thelma Battle, and all others
Name of Party

* * * *

Attorney

Name Douglas Taylor

Phone (202) 296-7420

Firm Gromfine and Taylor

Address 1101 15th Street, N.W., Suite 1010
Washington, D.C. 20005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKETING STATEMENT

All Cases Other than Administrative Agency Cases
(To be completed by appellant/petitioner)

1. CASE NO. 88-7074
2. DATE DOCKETED MARCH 21, 1988
3. CASE NAME

   (lead parties only) Thelma Battle, et al., v. District of Columbia
4. TYPE OF CASE: ☒ District Ct—☒ US Civil —— Private —— Civil —— Criminal —— Bankruptcy —— Bankruptcy if direct from Bankruptcy Court —— Original proceeding ——
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED?

   YES —— NO ☒

   IF YES, cite statute: _____
6. CASE INFORMATION:

   a. District Court Docket No.

      Civil Action 87-1675 GHR

      Criminal _____

      Miscellaneous _____

      Bankruptcy Court Docket No. _____

      Bankruptcy _____

      Adversary _____

      Ancillary _____

      Tax Court Docket No.

      Tax _____

b. Review is sought of: ☒ Final Order
——Interlocutory Order

appealable as of right
——Interlocutory Order certified for appeal

c. Name of judge who entered order being appealed: Judge George H. Revercomb Magistrate ————

d. Date of order(s) appealed (use date docketed) January 28, 1988

e. Date notice of appeal filed: February 26, 1988

f. Has any other notice of appeal been filed in this case?

Yes —— No ☒

IF YES, give date filed: ————————

g. Are any motions currently pending in trial court?

Yes —— No ☒ IF YES, identify motion and date filed: ————————

h. Has a transcript of proceedings been ordered pursuant to FRAP 10(b)?

Yes —— No ☒ If NO, why not? none required

i. Has this case previously been before this Court under another appeal number?

Yes —— No ☒ IF YES, give appeal number(s): ————

j. Are any cases involving the same underlying order or, to counsel's knowledge involving substantially the same issues, currently pending before the District Court, this Court or the Supreme Court?

Yes Yes —— No ☒ IF YES, give docket number(s) of these cases: ————

k. Does this case turn on the validity of correct interpretation or application of a particular statute? Yes —— No —— IF YES, give popular name and citation of statute: Standards Act, 29 U.S.C. Section 207(a)(1)

Signature ———————————— Date ————

Name of Counsel or Pro Se Litigant (Print) Douglas Taylor

Firm Gromfine and Taylor Phone (202) 296-7420

Address 1101 15th Street, N.W. Suite 1010 Washington D.C. 20005

Counsel for Appellant (Name of Party) Thelma Battle et. al.,

ATTACH CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 10 days by letter, with copies to all other parties specifically referring to the challenged statement. An original and three copies of such letter should be submitted.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

CA 87-01675

No. 88-7074

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA CORPORATION COUNSEL

BEFORE: Buckley and D.H. Ginsburg, Circuit Judges

ORDER TO SHOW CAUSE

Upon noting that the notice of appeal in this case was filed by The District of Columbia Nurses' Association and further noting that the district court dismissed District of Columbia Nurses' Association as a party on the Association's motion, it is

ordered by the court on its own motion that the parties show cause within twenty-one days of the date of this order why this appeal should not be dismissed. *See Torres v. Oakland Scavenger Co.*, 56 USLW 4740 (June 24, 1988) (court of appeals only has jurisdiction over appeals of parties named in notice of appeal); *United States v. LTV Corp.*, 746 F. 2d 51, 53 (D.C. Cir. 1984) (only party to district court action may note an appeal).

The clerk is directed to send copies of this order to the parties by certified mail, return receipt request.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA CORPORATION COUNSEL,
Appellee.

RESPONSE TO ORDER TO SHOW CAUSE

In response to the Court's July 6, 1988 order to show cause why the appeal should not be dismissed, the District of Columbia states that the appeal should be dismissed.

As the Court observed, the District of Columbia Nurses' Association was dismissed as a party in the district court, on its own motion. The notice of appeal in this case was filed by the District of Columbia Nurses' Association. Thus, no party to the action below has filed a notice of appeal, and this Court lacks jurisdiction to hear the appeal. *Torres v. Oakland Scavenger Co.*, —— U.S. ——, 56 USLW 4740 (June 24, 1988) (court lacks jurisdiction over claim of party not named in notice of appeal); *United States v. LTV Corp.*, 746 F. 2d 51, 53 (D.C. Cir. 1984) (only a party below may note an ap-

peal). Accordingly, the appeal in this case should be dismissed.

Respectfully Submitted,

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.
CHARLES L. REISCHEL

Deputy Corporation Counsel, D.C.
Appellate Division

SUSAN S. MCDONALD
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District Building, Room 305
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Washington, D.C. 20004
Telephone: 727-6252

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing response to order to show cause was mailed, postage prepaid, this 19th day of July 1988, to Douglas Taylor, Esquire, I.J. Gromfine, Esquire, 1101 15th Street, N.W., Suite 1010, Washington, D.C. 20005.

SUSAN S. MCDONALD
Assistant Corporation Counsel, D.C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 87-01675

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

MOTION TO ALLOW APPEAL AND REDESIGNATE APPELLANTS

The court has, *sua sponte*, ordered the parties to show cause why this appeal should not be dismissed. It should not, and Plaintiffs below, Thelma Battle, et al., should be designated as Appellants for the following reasons.

1. It was unclear that the District of Columbia Nurses Association ("D.C.N.A.") was not a party below. The D.C.N.A. Motion to Amend its complaint and Amended Complaint included several changes, including a removal of D.C.N.A. as a party. However, when the court granted that motion, it did so generally and DCNA remained a part of the case caption, on all subsequent documents, including the Memorandum and Order of the Court from which thus appeal is taken (Order granting Plaintiff's Motion and subsequent Memorandum and Order are Attachments 1, 2, and 3 respectively).

2. The Notice of Appeal, though filed in the name of D.C.N.A. only expressed the intent of all Plaintiffs.

All individual named Plaintiffs are *both* members of D.C.N.A. and represented by it in employment matters, and clients, with D.C.N.A., of Counsel for Plaintiffs.

3. D.C.N.A. represents for purposes of collective bargaining over pay matters (including overtime, the subject of this lawsuit), all registered nurses employed by the District of Columbia including many who are not named parties in this action. At one time D.C.N.A sought "representative" status in instant matter and was a named party until shortly before the final judgment. D.C.N.A., then, meets the strictures of several exceptions to the general rule that only named parties may appeal, see *U.S. v. LTV Corp.*, 746 F. 2d 51 (D.C. Cir. 1984) at 53, fn. 5 and Moores Federal Practice 203.06.

For all of the foregoing reason, the Appeal should be allowed, and the names of individuals claimants/Plaintiffs, *Thelma Battle*, et al., adopted as appellants.

Respectfully Submitted,

Counsel for the District of
Columbia Nurses Association
Plaintiffs Thelma Battle, et al.,

July 22, 1988

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 87-01675

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION TO ALLOW APPEAL AND REDESIGNATE ALL PLAINTIFFS AS APPELLANTS

PERTINENT FACTS

This action was originally filed in June, 1987, by D.C.N.A. and nine other named plaintiffs to enforce overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. D.C.N.A. sought status as "class representative" of all registered nurses employed by the District of Columbia. With all other Plaintiffs, D.C.N.A. moved for summary judgment on November 16, 1987. On that same date, the District Corporation Counsel also moved for summary judgment on grounds, *inter alia* that D.C.N.A. lacked standing as a class representative. In response, D.C.N.A. moved to amend its complaint to remove any questions relating to "class action" under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* and the status of D.C.N.A., so as to permit the court to address the merits of the dispute directly.

D.C.N.A.'s Motion to Amend was granted generally December 10, (Attachment 1) but the caption of the case was never changed. Counsel for D.C.N.A. (also Counsel for other Plaintiffs) argued in favor of summary judgment. The only documents entered into the record below prior to appeal and after granting D.C.N.A.'s Motion to Amend were the Judgment and Memorandum of the District Court. (Attachments 2 and 3)

I. DISTRICT OF COLUMBIA NURSES ASSOCIATION APPEARED TO BE CONSIDERED A PARTY BY THE COURT BELOW.

The Complaint was amended in this case to remove all aspects of a "class action" and to remove D.C.N.A. as a party. Although the Motion to Amend was granted, it was not clear that D.C.N.A. was no longer a party. The main indication to the contrary was that on all subsequent documents, including the Court's own judgment and Memorandum, D.C.N.A.'s name appeared as a "party."

II. IN FILING APPEAL, THE DISTRICT OF COLUMBIA NURSES ASSOCIATION SPOKE FOR AND ON BEHALF OF THE OTHER NAMED PLAINTIFFS, ITS MEMBERS.

The congruity of interests among D.C.N.A. and the other named plaintiffs is apparent. D.C.N.A. has a clear interest in assuring that its members receive full pay for their overtime work, and that the salutary effect of FLSA, to help assure that a sufficient number of nurses are hired, is enhanced. When overtime is paid under law, the total compensation of nurses is improved—a central goal of D.C.N.A. as collective bargaining representative. Even though D.C.N.A. was not technically a class representative, its appeal through the legal counsel it shared with plaintiffs, may be considered an expression of *their* intent to appeal as well. Parties were referred to throughout this litigation as "D.C.N.A. et al.,." Had the

Notice of Appeal read "D.C.N.A., et al., instead of "D.C.N.A.," the other plaintiffs would have been permitted as appellants, see *Ayer v. Sears, Roebuck*, 789 F. 2d 1173 and *Parrison v. Board of Covers of Alabama State Bar*, 505 F. 2d 12 (5th Cir., 1974) withdrawn on other grounds, 509 F. 2d 540 (1975). To preclude this appeal because of the absence of "et al." would be to exalt form over intention. There is no substantial harm of prejudice in allowing Plaintiffs to add "et al." to the Notice of Appeal at this date. As the Seventh Circuit recently made clear, authority to allow this change may be found in the All Writs Act, 28 U.S.C. 1651, *Chathas v. Smith*, 848 F. 2d 93, 56 USLW 2710 (7th Cir. 1988) (Attachment 4 hereto).

III. DISTRICT OF COLUMBIA NURSES ASSOCIATION HAD STANDING TO APPEAL APART FROM THAT OF A PARTY.

As the court made clear in *U.S. v. LTV Corp.*, 746 F. 2d 51 (1984) there are exceptions to the general rule that only parties to an action may appeal its outcome. An appellant must be "privy to the record" below and must be aggrieved by the order appealed from. There is no question here that D.C.N.A. was privy to the record. It was a party for six of the seven months this matter was pending. Its removal as a party was equivocal, and was the last record entry before the judgment appealed from. The only question is, then, whether D.C.N.A. was "aggrieved" directly and sufficiently to bring it within the exceptions noted by the Court in *LTV Corp.*, supra. It was so aggrieved.

In *Adams v. Morton*, 581 F. 2d 1314 (9th Cir., 1978) an Indian Tribe never entered as a party in a suit by some of its members against the U.S. Secretary of the Interior. The tribe was, however, permitted to appeal, largely on grounds that it had participated by filing papers and presenting argument in the lawsuit and would be clearly affected by the outcome. Here, similarly,

D.C.N.A.'s members who are and are not named parties to the lawsuit will be bound by its outcome: that nurses employed by the District of Columbia are exempt from the maximum hours provision of F.L.S.A. In addition, D.C.N.A. itself, in fashioning and enforcing its collective bargaining agreement with the District, must account for overtime pay. The contractual pay schedule, for example, was negotiated by D.C.N.A. in contemplation of overtime payments under FLSA. If they are unavailable, this changes the overall value of the compensation structure established by D.C.N.A. and the District in a contract which D.C.N.A. is a party. Specific overtime, weekend work and on-call/call-back provisions of the collective bargaining agreement are directly affected if FLSA does not apply to nurses. (Affidavit of Freeman-Owen, Exhibit 1, pp. 8-9, Attachment 5 (hereto). As a consequence, D.C.N.A. is clearly "aggrieved" by the holding of the lower court that nurses covered by the contract are exempt professionals under FLSA.

CONCLUSION

For all the foregoing reasons, the Appeal should be allowed, and individual plaintiffs below added as appellants.

Respectfully Submitted,

DISTRICT OF COLUMBIA NURSES ASSOCIATION AND

THELMA BATTLE, *et. al.*, PLAINTIFFS

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